No. 13[illegible]

In The United States Court of Appeals

For the Ninth Circuit

DALE MENEFEE,

Appellant,

vs.

W. R. CHAMBERLIN CO., a corporation,

Appellee.

From the United States District Court for the Western District of Washington, Northern Division

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BRIEF OF APPELLEE

BOGLE, BOGLE & GATES,
EDW. S. FRANKLIN,
Proctors for Appellee.

603 Central Building,
Seattle 4, Washington.

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INDEX

TABLE OF CASES

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STATEMENT OF THE CASE

This appeal presents only the question as to the correctness of the decree of the lower court awarding appellant Menefee $750.00 for damages as the result of a bruised right leg sustained by him at sea on January 23, 1947 when a member of the crew of the SS "ROBERT PARROT", operated by appellee. Appellant was injured when a wave washed over the vessel throwing him to the deck, under circumstances deemed by this court to constitute negligence of the vessel owner (1949 A.M.C. 1388, opinion June 23, 1949).

He was treated at sea by Purser/Pharmacist's Mate

Brown until the vessel reached Yokohama four days later on January 27, 1947, where his injuries were diagnosed by Lt. Waterman, an Army doctor, as a severe bruise of the right leg. However, it was the opinion of Dr. Waterman that appellant could resume his usual duties in four or five days time thereafter. (Tr. 148) At Saipan, the next port of call, appellant was also seen by an Army doctor, (Tr. 149) and resumed his regular duties as an ordinary seaman while the vessel was en route from Saipan to Hongkong some indeterminate time between February 4th and February 26th, 1947.

Appellant testified as follows:

"Q. When did you return to your sea duties, Mr. Menefee?

"A. Between Saipan and Hongkong.

"Q. You arrived in Hongkong, the sailing list shows, on February 26th, and you left Saipan February 4th, so that it was some time in that interval?

"A. Yes.

"Q. And you returned to your regular sea duties thereafter, did you?

"A. Yes.

"Q. And you had no further treatment at any time because of the condition of your back or your leg, after you left Saipan?

"A. No, I didn't have any more treatment.

"Q. You stopped at several ports, didn't you, before you reached Cape Town, from the time you left Hongkong?

"A. I stopped at New Guinea, Durbin, Madagascar and Reunion Island." (Tr. 48-49)

Purser/Pharmacist's Mate Brown testified similarly.

"Question: You have already testified to the fact Mr. Menefee worked during that period of time —Saipan to Hongkong.

"Answer: Yes, that's right.

"Question: After the vesel left Hongkong, where was the next port of call?

"Answer: Lae, New Guinea.

"Question: Did Mr. Menefee carry out his duties between Hongkong and Lae, New Guinea?

"Answer: Yes.

"Question: What was the next port of call?

"Answer: Durban, South Africa.

"Question: Between Lae and South Africa, did Menefee carry out his duties as an A. B."

"Answer: Yes, he seemed completely recovered and made no complaint during that time.

"Question: And, the next port of call after Durban, South Africa, was what port?

'Answer: Tamatave, Madagascar.

"Question: During that portion of the voyage did he make any complaint?

"Answer: No, he didn't." (Tr. 149-150)

Chief Mate Kloppenstein was incorrect in his statement that Menefee was off duty for a month after his accident. (Tr. 109) He testified, however, that Menefee worked continuously after Saipan until the vessel reached Cape Town July 2, 1947, performing his usual sea duties. (Tr. 109)

On cross-examination Chief Mate Kloppenstein further testified as follows relative to appellant's physical activities between the time of his return to work en route to Hongkong in February, 1947, and the arrival of the vessel in Cape Town, July 2, 1947:

"Q. But, you did not think it wise to give him any heavy work as long as he was on the vessel after the accident?

"A. Menefee just went ahead and did the work of an ordinary seaman at the time.

"Q. But, you didn't give him — you just gave him light work?

"A. Whenever I had an opportunity, I have given him the light jobs." (Tr. 136-137)

Appellant testified as follows relative to his physical condition at Hongkong:

"A. Well, the swelling had gone down. The discol-

oration of it had disappeared. The leg seemed to have been fair but it was my back that was bothering me. I seemed to have paralysis on my hip and my back up to my shoulder." (Tr. 24)

The vessel, after leaving Hongkong, stopped at a number of Asiatic and African ports before arriving in Cape Town, but appellant did not ask for or obtain any medical treatment ashore.

Appellant missed the vessel at Cape Town, July 3, 1947. He later signed on the SS "ROBIN GOODFELLOW" as an ordinary seaman, and returned to New York, where he was discharged August 23, 1947 (Tr. 33)

The trial of the libel was had August 17th and August 18th, 1948. At no time since his arrival in the United States a year earlier had appellant sought medical advice or treatment from any Marine Hospital in the United States because of any claimed complaint with his right leg or back, (Tr. 64-65) nor had he sought private medical attention. He was complaining at the trial of ill health, due to nervousness which he admitted had always bothered him. (Tr. 67) He also complained that his eyes were bothering him and he was dizzy. (Tr. 67)

Appellant produced no medical or expert testimony at the trial to corroborate his claim of pain, suffering or temporary or total incapacity to work as the result of his accident.

SEVERITY OF APPELLANT'S INJURY

Appellant's claim of the alleged seriousness of his injury and its disabling effects finds no support in the record.

The testimony preponderantly establishes that appellant's injury was superficial in character, being a bruised leg which required a limited period of rest until recovery was obtained. By remaining off his leg until healed, appellant minimized any discomfort resulting from the injury. Bruises are incidents of everyday human experience attended by a minimum of pain and suffering. They heal without medication with rest.

The record likewise refutes Menefee's assertion that he was "bed fast" for a month following his injury of January 23, 1947. He testified he returned to his work as ordinary seaman between February 4, 1947, when the vessel left Saipan, and February 26, 1947, when it reached Hongkong. At Yokohama and Saipan he went ashore several times for medical treatment. His condition at Saipan as to physical activity was described as follows by Purser/Pharmacist's Mate Brown:

> "Answer: When we first arrived, he was only able to hop around on crutches — it wasn't advisable for him to walk more than was absolutely necessary." (Tr. 148)

The libel which was filed November 23, 1947 (Tr.

2,3) alleges only by way of injuries " a crushing of the right lower leg." At the trial of the case, appellant made some complaint of a back injury (Tr. 28) which was presently disabling and he intimated was a sequence of his accident. However, the testimony of all of the witnesses except appellant in the trial of the case established that the only injury he sustained was a bruise to his right leg. Such was the testimony of Chief Mate Kloppenstein, Purser/Pharmacist's Mate Brown, set out above, and appellant's witnesses, Englund (Tr. 73-75) and Jacobson. (Tr. 84)

The testimony of Purser/Pharmacist's Mate Brown and Chief Mate Kloppenstein is particularly convincing and persuasive. Kloppenstein had appellant under constant supervision after his return to work after his accident in February, 1947. He states Menefee did the work of an ordinary seaman thereafter although if he had an opportunity he would give him light work. (Tr. 137) This is readily understandable since Menefee was only an ordinary seaman with limited sea experience, and his work would naturally be restricted to standing a watch and doing deck painting, and lighter work of a similar character.

Purser/Pharmacist's Mate Brown testified after returning to his regular work as ordinary seaman, Menefee appeared completely recovered and made no further complaint as to his physical condition for the balance of the trip. (Tr. 150) Because of his medical training and experience and familiarity with Menefee's

injury Brown's testimony deserves special consideraton.

We believe the record before the able and conscientious trial Judge adequately supports his conclusions as stated in the court's decision, "there were no bone injuries or injuries connected with bone or muscles likely to be seriously disabling for any considerable length of time," (Tr. 17) and he was eminently correct in characterizing Menefee's injury as "a flesh injury."

In evaluating Menefee's testimony as to the nature and extent of his injuries, the court was required to determine his credibility which we believe was considerably impaired by a discredited explanation as to the circumstances under which he missed the vessel at Cape Town July 2, 1947 (his second cause of action for alleged abandonment by the vessel was dismissed and no appeal taken therefrom). (Tr. 51-64)

TESTIMONY JUSTIFYING AWARD

The following record facts justified the court in concluding that Menefee's injuries were temporary in character and caused him no undue pain or suffering:

1. Menefee's injury was a bruised leg.
2. He kept off his injured member for a period of two or three weeks, thereby minimizing any pain to the injured member.
3. He returned to his regular work two or three weeks after his accident, and worked steadily without complaint to anyone from the middle of February, 1947 until he missed the vessel in Cape Town July 3, 1947.
4. After his return to work, he sought no medical treatment while aboard the vessel, although it was available to him both from the Purser and at various Asiatic and South African ports.
5. He arrived in New York August 23, 1947 and up to the time of the trial of his libel August 17, 1948, he had not consulted a physician nor availed himself of the free medical service at any United States Marine Hospital.
6. Menefee offered no medical or expert testimony on the trial of his case to corroborate his complaints of continuing disability.
7. At the trial a year later he testified that he was then suffering from physical conditions unrelated to his accident.

AUTHORITIES JUSTIFYING AWARD

To justify his claim for an increased award, appellant cites several admiralty cases in which awards were made for pain and suffering in excess of that allowed in this case. An examination of those cases will reveal that they all involved extremely serious injuries, with prolonged operative treatment and hospitalization, with permanent disabling aftermaths and extended periods of pain and suffering. They bear no relation to the facts of this case.

In *National Bulk Carriers v. Hall,* 152 F. (2d) 658, (5 CCA, 1945) the court said:

> "There is no standard for the measurement of damages for pain and suffering."

In that case the seaman lost 87 days time as the result of a hernia operation and was awarded $250.00 for pain and suffering.

In the case of *Halligan v. Waterman Steamship Corporation,* 1938 A.M.C. 871, the injury, a sprained ankle, was comparable to the injury at bar. Liability was found and United States District Judge Coxe of the Southern District of New York said:

> "With respect to the injuries, I doubt whether the libellant sustained anything more than a sprained ankle. The X-ray photographs show no broken bones, and the ankle swelling appears to be little more than might reasonably be expected to accompany a sprain. Moreover, the libellant has been employed during the greater part of the time since the accident. I think that $650 is entirely

adequate both for the injuries and for maintenance and cure."

In *Miller v. United States,* 1940 A.M.C. 475, the seaman was in the hospital three months for a back injury, and damages for pain and suffering were awarded in the amount of $450.00.

In *Serio v. Steamship Ivan,* 1944 A.M.C. 409, the sum of $800.00 was awarded a seaman for pain and suffering as the aftermath of a severe fall and hernia operation.

For a five week disability where the seaman was struck in the head by an improperly placed stern line, District Judge Wyzanski awarded the libellant $750.00 in the case of *Cresey v. Staples Coal Company,* 1944 A.M.C. 1498.

The above cases set a pattern for the award of damages for pain and suffering to injured seamen where the injury is temporary in character and comparable to Menefee's injury.

In making the award for pain and suffering the court took special cognizance of the current inflated value of the dollar as well as all other proper elements to be considered in fixing damages. (Tr. 17)

The findings and decree of the lower court reaches this court encased in their usual armor of correctness.

This court said recently in *Tawada v. United States,* 162 F. (2d) 615:

> "In an appeal in admiralty, where 'a substantial part of the evidence was heard in open court,' the 'correct rule' is that the findings of the trial court 'are accompanied with a rebuttable presumption of correctness.' *Thomas v. Pacific S.S. Lines, Ltd.*, 9 Cir., 84 F. 2d 506, 507, 508; The Pennsylvanian, 9 Cir., 149, F 2d 478, 481. And, 'where all of the evidence is heard by the trial judge and the question is one of credibility of witnesses on conflicting testimony, the presumption (that the findings of the District Court are correct) has very great weight.' "

In that case, as in this, the District Court rejected libellant's testimony, and this court refused to disturb the findings of the District Court in view of the opportunity of the trial court to pass upon the credibility of libellant.

We respectfully submit that the award of damages made appellant for pain and suffering was adequate and liberal in amount in view of the character of the injuries he sustained and the testimony relative thereto and this court should not disturb the award of the District Court.

Respectfully submitted,

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EDW. S. FRANKLIN,

Proctors for Appellee.